SUPREME COURT, U. S.

Nos. 1295, 1328 and 1333

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In the Supreme Court of the United States

OCTOBER TERM, 1968

ALLEGHANY CORPORATION, et al.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

BETTY LEVIN, et al., *Petitioners,*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

ROSE SLAYTON, et al., *Petitioners,*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

On Petitions For Writs of Certiorari to The United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

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INDEX

	PAGE
Questions Presented	2
Statement of the Case	3
Prior Proceedings in this Court	3
Judgment of the District Court	3
The Decision of the Court of Appeals	4
Argument	6
I. The Decision of the Court of Appeals Is Consistent With The Applicable Decisions of this Court	6
II. The Decision of the Court of Appeals Is Not In Conflict With the Decision of Another Court of Appeals	8
III. The Decision of the Court of Appeals That Petitioners Should Not Be Awarded Attorneys' Fees and Expenses Under Established Law and The Circumstances of this Case Does Not Raise an Important Federal Question	9
Conclusion	11

AUTHORITIES

Cases

Alexander v. Atlanta and W.P.R. Co., 113 Ga. 193, 38 SE 772 (1901)	10
Bank of America Nat. T. & Sav. Ass'n v. West End C. Co., 37 Cal. App. 2d 685, 100 P. 2d 318 (1940)	10
Burley Tobacco Co. v. Vest, 165 Ky. 762, 178 S.W. 1102 (1915)	10

PAGE

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) 6, 8

Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967) 7

Mississippi River Fuel Corp. v. Slayton, 259 F. 2d 106 (8th Cir. 1966), rev'd. sub. nom. Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (1967) 8

Oil & Gas Income, Inc. v. Woods Exploration & Producing Co., 362 F. 2d 309 (5th Cir. 1966); same case 395 F. 2d 753 (5th Cir. 1968) 8, 9

Sprague v. Ticonic Bank, 307 U.S. 161 (1939) 6, 8

Surowitz v. Hilton Hotel Corp., 383 U.S. 363 (1966) 10

Trustees v. Greenough, 105 U.S. 527 (1881) 6, 8

Statutes

Interstate Commerce Act, §5, 49 U.S.C. §5 (1964) 9

Securities Act of 1933, §11(e), 15 U.S.C. §77 k(e) (1964) 9

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This brief is submitted in opposition to three separate petitions for certiorari, all of which seek review of the same decision of the Court of Appeals for the Eighth Circuit, *Missouri Pacific Railroad Co.* v. *Slayton,* 407 F. 2d 1078 (8th Cir. 1969).

Questions Presented

(1) Whether petitioners should pay their own attorneys' fees and expenses incurred in litigation which materially benefited them individually, or whether one of the corporate defendants in which they are members of one class of shareholders should be required to pay those fees and expenses as well as its own, when the litigation in no way enhanced the assets of the corporation or created or preserved a fund?

(2) In an effort to frame questions that appear to come within the standards of Rule 19 of this Court, petitioners have fragmented the foregoing question into several parts, which may be summarized as follows:

(a) Did the Court of Appeals decide an important question of federal law in a way in conflict with applicable decisions of this Court, specifically, *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714 (1967); *Sprague* v. *Ticonic Bank,* 307 U.S. 161 (1939) and *Trustees* v. *Greenough,* 105 U.S. 527 (1881)?

(b) Is the decision of the Court of Appeals in conflict with the decision of another court of appeals on the same matter, specifically with *Oil & Gas Income, Inc.* v. *Woods Exploration & Producing Co.,* 362 F. 2d 309 (5th Cir. 1966); same case 395 F. 2d 753 (5th Cir. 1968)? (Raised only in the Slayton petition, No. 1333.)

(c) Does the Court of Appeals' decision applying established law and holding that class plaintiffs in corporate litigation should not be awarded attorneys' fees and expenses under the circumstances of this case, constitute an important federal question to be settled by this Court? (Raised only in the Slayton petition, No. 1333.)

Statement of the Case

The three petitions for certiorari in Nos. 1295, 1328 and 1333 seek this Court's review of a judgment rendered by the Court of Appeals for the Eighth Circuit on an appeal to it from the District Court for the Eastern District of Missouri. The decision of the District Court was entered on remand for further proceedings from this Court in *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967).

Prior Proceedings in this Court

The issue before this Court in *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 (1967) arose on petition of the same parties who present the current petitions. At issue was the right of the holders of the Class B stock of the Missouri Pacific Railroad Company ("MoPac") to vote as a class on the proposed consolidation of MoPac and the Texas and Pacific Railroad Company. This Court reversed the decision of the Court of Appeals for the Eighth Circuit and held that the holders of the Class B stock did have a right to vote as a class on the proposed plan.

Judgment of the District Court

In March, 1967, after this Court's opinion had been rendered and mandate had issued, respondent MoPac and the Texas and Pacific Railroad abandoned the consolida-

tion plan and withdrew it from consideration by the Interstate Commerce Commission.[1] The District Court in due course entered a declaratory judgment upholding petitioners claims as Class B MoPac shareholders. The Court also held that the suits were properly maintained as class actions.

After a hearing on petitioners' applications for an award of attorneys' fees and expenses, the District Court denied requests to assess fees and expenses against the directors of MoPac and Mississippi River Fuel Corporation (the majority Class A shareholder of MoPac), who were parties defendant; but the Court assessed fees and expenses against respondent MoPac and awarded them in the amount of $224,739.09 to petitioners in No. 1295, (Alleghany Corporation), $187,504.85 to petitioners in No. 1328, (Levin, et al) and $177,843.24 to petitioners in No. 1333, (Slayton, et al).

The Decision of the Court of Appeals

The Court of Appeals for the Eighth Circuit reversed.[2] The Court summarized the issues as follows:

> "(1) Under the facts of this case, did the District Court abuse its discretion or not in assessing attorneys' fees and expenses incurred in the declaratory judgment action against Mo-Pac?

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[1] This summary of the further proceedings in the District Court is based on the opinion of the District Court reported as *Slayton* v. *Missouri Pacific Railroad Company*, 279 F. Supp. 525 (E.D. Mo. 1968).

[2] The summary of proceedings in the Court of Appeals is taken from the opinion of the Court of Appeals in *Missouri Pacific Railroad Co.* v. *Slayton*, 407 F. 2d 1078 (8th Cir. 1969).

> "(2) If not, are the amounts allowed reasonable, particularly in light of the alleged duplication of effort on the part of counsel for the various plaintiffs?" *Missouri Pacific Railroad Co.* v. *Slayton,* 407 F.2d 1078 at 1080 (8th Cir. 1969)

After carefully reviewing the facts in this case, and the applicable authorities, the court answered the first question in the affirmative and reversed the award of the District Court. The Court of Appeals pointed out that there was no statutory or contractual provision for payment of attorneys' fees and expenses, that there was no recovery, enhancement or preservation of corporate funds as a result of the action, that the benefit from the action accrued not to the corporation, but to petitioners, and that there were otherwise no circumstances that compelled departure from applicable settled federal doctrine. Having answered the first question in the affirmative the court did not pass on the second.

Argument

I. The Decision Of The Court of Appeals Is Consistent With The Applicable Decisions of This Court.

All that is at issue in these proceedings is whether these petitioners should bear their own expenses of litigation. As recently as 1967 this Court reaffirmed the American practice of requiring litigants to pay their own fees:

> "Although some American commentators have urged adoption of the English practice in this country, our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 at 717 (1967).

Petitioners variously assert that the decision of the Court of Appeals is inconsistent with *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), *Sprague* v. *Ticonic Bank*, 307 U.S. 161 (1939) and *Trustees* v. *Greenough*, 105 U.S. 527 (1881). Petitioners misread the thrust of the decision of the court, which in no way challenged the power of the district court to award attorneys' fees and expenses in a particular case where the facts warrant. The court clearly stated the issue as one of determining whether the trial court abused its discretion under the facts of this case by awarding attorneys' fees and expenses in the absence of statutory or contractual provision, the creation of a fund, or the enhancement or preservation of funds of the corporation.

The Court of Appeals, reviewing the circumstances of this case, found no hardship to the plaintiffs in bearing their own expenses of litigation in view of their sub-

stantial pecuniary interest and the very substantial benefits petitioners claimed to have obtained as a result of the litigation. The court noted that MoPac had received no tangible and measurable benefits requiring that, in justice, it pay petitioners' attorneys' fees and expenses as well as its own. The principal beneficiaries of the action were the plaintiffs in their capacity as Class B stockholders.

The court properly rejected as a criterion of the award the fairness or lack thereof of the plan of consolidation, upon which no court had passed and indeed no evidence had been heard. Petitioners point to language in the opinion of the district court stating that the inherent unfairness of the plan warrants a departure from the settled federal rule that litigants pay their own attorneys' fees. *Slayton* v. *Missouri Pacific Railroad Co.*, 279 F. Supp. 525 at 529 (E. D. Mo. 1968). This statement, disapproved by the Court of Appeals, was made without hearing any evidence on the fairness of the plan after this Court had stated explicitly:

> "We do not, of course, reach the merits of the proposed plan which is the concern of the Commission in the first instance. Any reference to the effect of the plan is not to be construed as in any way passing upon its merits." *Levin* v. *Mississippi River Fuel Corp.*, 386 U.S. 162 at 170 (1967).

In any event whether a case is an unusual one on the merits is not the point. The issue is whether in a particular case, it would be clearly unjust to adhere to the basic American rule that litigants shall assume and pay their own attorneys' fees.

For the District Court to rest a monetary award exceeding half a million dollars on a finding of unfairness of the proposed plan without notice or hearing on the fairness

of the plan would violate fundamental concepts of due process. Furthermore that is not the issue on the question of payment of attorneys' fees.

Such a finding also overlooks the difficulty of the voting-right issue litigated. That reasonable men may in good faith determine that issue as the directors did is demonstrated by the unanimous opinion of the Court of Appeals in the first appeal approving the directors' action. The subsequent reversal of that decision by this Court carried with it no finding of bad faith. *Mississippi River Fuel Corp.* v. *Slayton,* 259 F. 2d 106 (8th Cir. 1966), rev'd. sub. nom. *Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162 (1967).

This decision is not in conflict with *Trustees* v. *Greenough,* 105 U.S. 527 (1881), which this Court recognized as an exception to the general rule in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714 (1967). In that case the fees had been awarded to one *cestui que trust* of a fund which had been augmented by his efforts. These fees were in fact paid from the fund which his efforts had created. Similar facts were involved in *Sprague* v. *Ticonic Bank,* 307 U.S. 161 (1939), except there the fund had been created by the *stare decisis* effect of plaintiff's action rather than through a formal class suit. In any event all that the Court decided in *Sprague* was that the lower courts erred when they held they were without power to award fees under any circumstances.

II. The Decision of The Court of Appeals Is Not In Conflict With The Decision of Another Court of Appeals.

Petitioners Slayton, et al., in No. 1333 assert that the decision is in conflict with the decision of the Fifth Circuit in *Oil & Gas Income, Inc.* v. *Woods Exploration & Producing Co.,* 362 F. 2d 309 (5th Cir. 1966); same case

395 F. 2d 753 (5th Cir. 1968). Although virtually none of the facts of the underlying cause of action in that case are set forth in either opinion, it is clear that attorneys' fees were allowed to a successful defendant under the terms of a statute which expressly authorized the court to tax attorneys' fees as costs "if the court believes the suit or the defense to have been without merit." Securities Act of 1933, §11 (e), 15 U.S.C. § 77 k(e) (1964). As pointed out above, p. 6, neither a fee contract nor a fee statute is involved in the case at bar.

Petitioners in No. 1333, assert that the foregoing decision is sufficient to allow the District Court in this case to make a finding of "inherent" unfairness of the plan of consolidation even though it had heard no evidence at all on the issue of fairness and each court passing on the issue in this litigation had expressly reserved the issue of fairness to the Interstate Commerce Commission, to which Congress relegated the issue. Interstate Commerce Act, §5, 49 U.S.C. §5 (1964). Even if the plan were deemed unfair after full hearing, that would not justify, as petitioners erroneously argue, the assessment of fees in litigation devoted exclusively to resolving the relative voting rights of stockholders and not dealing with the issue of fairness or ultimate adoption of the plan.

III. The Decision of The Court of Appeals That Petitioners Should Not Be Awarded Attorneys' Fees and Expenses Under Established Law and The Circumstances of This Case Does Not Raise An Important Federal Question.

Petitioners Slayton, et al., in No. 1333 argue that the decision of the Court of Appeals involves a matter of importance to representative and derivative class suits under Rules 23 and 23.1 of the Federal Rules of Civil Procedure. (Pet. pp. 6-8). The decision, however, represents no de-

parture from well recognized principles governing the award of attorneys' fees. The form of the suit, whether class suit or not, is immaterial. Revised Rule 23 does not deal with attorneys' fees nor affect existing law on that subject. Furthermore whether the suit was prosecuted as a class suit was entirely optional with petitioners. They could properly and equally effectively have prosecuted the action solely in their individual capacities. The Court of Appeals merely held, in accordance with established law, that a corporation should not be assessed attorneys' fees in litigation which enhances the position of one group of shareholders *vis-a-vis* another group of shareholders without augmenting the assets of the corporation. *Burley Tobacco Co.* v. *Vest,* 165 Ky. 762, 178 S.W. 1102 (1915); *Alexander* v. *Atlanta and W.P.R. Co.*, 113 Ga. 193, 38 S.E. 772 (1901); *Bank of America Nat. T. & Sav. Ass'n* v. *West End C. Co.*, 37 Cal. App. 2d 685, 100 P. 2d 318 (1940).

Petitioners seek to cast themselves in the same role as the plaintiff in *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966). That case did not involve an award of attorneys' fees and expenses. The plaintiff there, an immigrant with a limited English vocabulary and practically no formal education, had invested a little more than $2,000 in the defendant corporation.

Petitioners in all three pending petitions were substantial investors. They were led by Alleghany Corporation, an aggressive, well-financed corporate power vigorously resisting the denial of a class vote. Since the other petitioners had to rely on Alleghany Corporation, which owned more than 50% of the Class B stock, to vote "no" on the plan in order to prevent its approval, there is no showing of any need to duplicate all the legal efforts of Alleghany's attorneys at the expense of the corporation.

Conclusion

There are no equities in petitioners' favor which justify departure from the traditional American practice of requiring litigants to pay their own attorneys' fees. The petitioners, not the corporation, vindicated what they considered to be individual rights of great value. Petitioners are well able to pay and in justice should pay their own attorneys' fees.

Since none of the petitions for certiorari meet the standards for review established by this Court in Rule 19 of this Court the petitions should be denied.

Respectfully submitted,

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